In the
United States Circuit Court of Appeals
For the Ninth Circuit

No. 6469

DAVE CULJAK,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division

HONORABLE EDWARD E. CUSHMAN, JUDGE

Brief of Appellee

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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STATEMENT OF THE CASE

The indictment in this case contained four counts. The Court sustained an objection to the introduction of any evidence in support of counts II and III. The appellant was tried on the first and fourth counts. (Tr. p. 17.) The first count charged appellant with

the sale of two ounces of distilled spirits on October 17, 1930. The fourth charged appellant and one Forrest W. Nicholson with maintaining a common nuisance, beginning October 17, and continuing to November 22, 1930.

The appellant was acquitted on the first count, and he and Nicholson were convicted on the fourth or nuisance count. (Tr. p. 10.)

Count IV charged appellant and Nicholson with maintaining a common nuisance by manufacturing, keeping, selling, and bartering intoxicating liquor.

The sales counts were therefore, in a sense, included offenses.

The evidence introduced by the appellee under count I was also admissible under count IV.

ARGUMENT

First and Second Assignments of Error

Appellant and Nicholson were jointly charged and convicted under count IV. Appellant was acquitted under count I. There is no contention that appellant and Nicholson should not have been joined in count IV. Appellant rests his case on the proposition that inasmuch as both were joined in count IV, he could

not be tried on another count on which he alone was charged. The evidence introduced touching count I was also admissible under count IV so that had appellant only been tried on count IV, the evidence under count I would still have been admissible. It follows that no possible prejudice could arise from the joint trial of both counts. That point has been definitely settled by *Latses v. United States*, 45 Fed. (2nd) 949, wherein the Court said:

"Tested by the general requirement of the Criminal Code (18 U. S. C. A. Sec. 557) that two or more acts complained of must be connected together, or be of the same class of offenses, the indictment is good. And, in addition, the ordinary rule is that an acquittal on one misjoined count cures the misjoinder."

Beaux Arts Dresses v. U. S. (C. C. A. 2), 9 Fed. (2nd) 531, 533;

Morris v. U. S. (C. C. A. 9), 12 Fed. (2nd) 727;

Weinhandler v. U. S. (C. C. A. 2), 20 Fed. (2nd) p. 359.

In the case at bar, the trial was limited to two sales at the same time and place and the nuisance count; and but one of these sales was submitted to the jury. Nor was there any reason for separate trials. Trial courts, confronted with congested dockets must be and are allowed a wide discretion in the matter of separate trials, and such discretion is only reviewable

where there is a clear abuse thereof and where the record discloses that the rights of the defendants are thereby prejudiced.

Krause v. U. S. (C. C. A. 8) 147 Fed. p. 442;

Lennon v. U. S. (C. C. A. 8), 20 Fed. (2nd) p. 490;

Hole v. U. S. (C. C. A. 8), 25 Fed. (2nd) 430;

Brady v. U. S. (C. C. A. 8), 39 Fed. (2nd) 312, 313.

ASSIGNMENTS OF ERROR 3, 4, 5, 6, 8 AND 11

Evidence of four sales of liquor on the premises in question by appellant and Nicholson was introduced. Whether or not appellant maintained a nuisance there, was for the jury to say.

Page v. U. S. (C. C. A. Cal. 1922), 278 Fed. 41;

Fassoela v. U. S. (C. C. A. Cal. 1922), 285 Fed. 378.

ASSIGNMENT OF ERROR 7

The evidence showed that appellant and Nicholson were in charge of the premises, at least to the extent that they sold liquor there. That constituted a prima facie case. When appellant testified that he maintained the place, he waived his objection to the sufficiency of the evidence on that point.

Assignment of Error 9

Defendants often prove alibies by credible witnesses, that are not true. The truth about the date in question was for the jury, not counsel, to decide. The instruction is a correct statement and in favor of the appellant.

In any event appellant was acquitted on count I, which closes that count for purposes of appeal.

Assignment of Error 10

Before the instruction complained of was given, appellant had testified that he maintained the place in question. It follows that an instruction in the language of Judge Sawtelle was not necessary. The instruction given was correct.

We respectfully submit that the trial court should be sustained.

Respectfully submitted,

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